ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	MM Docket No. 92-195
	)	
Amendment of Section 73.202(b),	)	RM-7091
Table of Allotments,	)	RM-7146
FM Broadcast Stations.	)	RM-8123
(Beverly Hills, Chiefland, Holiday,	)	RM-8124
Micanopy, and Sarasota, Florida)	)	
	)	
In re Application of	)	
	)	
Heart of Citrus, Inc.	)	File No. BPH-940307IZ
	)	
For modification of the facilities	)	
of Station WXOF(FM),	)	
Beverly Hills, Florida	)	

To: Douglas W. Webbink, Chief
Policy and Rules Division
Mass Media Bureau

Dennis Williams, Assistant Chief
Audio Services Division
Mass Media Bureau

OPPOSITION TO PETITION FOR RECONSIDERATION

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Summary

While Dickerson, through rhetorical flourishes and visual aids, attempts to turn black into white and night into day, it is clear that, upon a full examination of the facts of this case, the Mass Media Bureau's ("Bureau") decision to allot Channel 292C3 to Beverly Hills, Florida, was proper. Dickerson, in an unusual burst of candor in its Application for Review, admitted that the goal of its participation in this proceeding was a 6 kilowatt upgrade. The Bureau's decision protects Dickerson so that it can achieve that goal. Given that Dickerson has received all the protection from interference that it asked for and to which it is entitled, its Application for Review was properly dismissed as moot. The Commission cannot countenance Dickerson's sudden proclamation that what it said it wanted was not in fact what it really wanted. To credit this change of mind would only encourage Dickerson's pursuit of whatever undisclosed ulterior motives it may be trying to advance. Dickerson has received what it wanted; therefore, its objection was properly dismissed as moot.

Gator Broadcasting Corporation ("Gator"), licensee of FM Station WRRX, Micanopy, Florida; Heart of Citrus, Inc. ("Heart"), permittee of FM Station WXOF, Beverly Hills, Florida; Times Publishing Company, licensee of FM Station WLVU, Holiday, Florida; and New Wave Communications, L.P., licensee of FM Station WSRZ, Sarasota, Florida, hereby oppose Dickerson Broadcasting, Inc.'s ("Dickerson") Petition for Reconsideration of both the dismissal of its Application for Review filed in the above-captioned proceeding and the grant of Heart's above-captioned application.

Background

1. In August 1989, Gator and Sarasota-FM, Inc. ("Sarasota"), predecessor licensee of Station WSRZ, filed a Petition for Rule Making ("Gator/Sarasota Petition") proposing the substitution of channels for their stations, for FM Station WXOF in Beverly Hills, Florida and for FM stations in Chiefland and Holiday, Florida.

2. One month later, Heart filed a Petition for Rule Making ("Heart Petition") proposing an upgrade of its facilities from Class A to Class C3 on Channel 246. Because they proposed different channels for Beverly Hills, Florida, the Gator/Sarasota and Heart Petitions were mutually exclusive.

3. Shortly thereafter, the Commission's new mileage separation rules, which increased the mileage separation requirements between Class A stations and other classes of FM

stations, went into effect.[1] Rule making petitions filed prior to adoption of the new rules, however, were to be processed under the old mileage separation rules.[2]

4. The Gator/Sarasota and Heart Petitions remained pending for more than three years until the Mass Media Bureau issued a Notice of Proposed Rule Making[3] for the Heart Petition. In response to this Notice, Gator and Sarasota filed a joint counterproposal ("Gator/Sarasota counterproposal"), which essentially reiterated the proposal put forth in their pending Petition.[4] The counterproposal proposed, inter alia, allocation of Channel 292C3 to Beverly Hills. This counterproposal was granted by the Bureau.[5]

5. Dickerson filed a Petition for Reconsideration protesting the Bureau's grant of the counterproposal on the basis that the allotment of Channel 292C3 to Beverly Hills impeded its efforts to increase the power of FM Station WEAG, Starke, Florida, to six kilowatts because of short-spacing between the station and Channel 292C3 under the new mileage separation rules. Dickerson claimed that the new rules were applicable to the Gator/Sarasota counterproposal

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[1] Amendment of Part 73 of the Rules to Provide for an Additional FM Station Class (Class C3) and to Increase the Maximum Transmitting Power for Class A FM Stations, 4 FCC Rcd 6375 (1989).

[2] Id. at 6382.

[3] 7 FCC Rcd 5910 (1992).

[4] To accommodate Heart's request for an upgrade and to allow both the Gator/Sarasota and Heart requests to be honored, the Gator/Sarasota counterproposal proposed Class C3 stations for Beverly Hills and Chiefland, Florida, instead of the Class A channels proposed in the parties' 1989 Petition for Rule Making. In all other respects, however, the Gator/Sarasota Petition for Rule Making and the counterproposal were identical.

[5] Report and Order, 8 FCC Rcd 2197 (Chief, Allocations Branch 1993).

because the counterproposal was filed after the new rules went into effect. The Bureau denied Dickerson's Petition.[6]

6. Dickerson then filed an Application for Review of the Bureau's decision, reiterating the arguments raised in its Petition for Reconsideration. In its Application, Dickerson "advise[d] the Commission and all parties hereto that, if Dickerson is assured the full measure of protection of the current mileage separations (as opposed to the mileage separations in effect prior to October 2, 1989), Dickerson will withdraw the instant application for review."[7] Accepting Dickerson's representation at face value, the Chief, Policy and Rules Division ("PRD") noted that Heart's application to implement the Channel 292C3 upgrade for Station WXOF had been filed pursuant to the contour protection standards of Section 73.215 of the Commission's rules and expressly afforded Station WEAG protection as if it were a six kilowatt station. Station WEAG would be able to treat Station WXOF as if Station WXOF were fully spaced under the current rules. The Bureau had granted this application on March 21, 1996. Therefore, noting that Dickerson had received the relief it sought, the PRD Chief dismissed the Application for Review.[8]

7. Still not satisfied, however, Dickerson filed a Petition for Reconsideration contesting the PRD Chief's authority to dismiss its Application for Review and continuing to

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[6] Memorandum Opinion and Order, 8 FCC Rcd 8515 (Chief, PRD 1993).

[7]Dickerson Application for Review, at 9 n.3 (Jan. 7, 1994); see also Dickerson Petition for Reconsideration, at 8 (April 27, 1993) ("If Beverly Hills becomes a C3 on Channel 292C3, Dickerson requests a footnote that they must protect WEAG by contour protection under 73.215 as a 6 kw Class A . . . .")

[8]Memorandum Opinion and Order, DA 96-403 (Apr. 16, 1996).

oppose the Beverly Hills allotment. With respect to its explicit commitment to withdraw its Application should it receive the full protection of the current mileage separations, Dickerson claimed that what it really meant by the representation was that it would be satisfied only if it could be protected by a fully-spaced transmitter site rather than by application of Section 73.215, a situation it knew would be impossible to achieve.

The PRD Chief Acted on Dickerson's Express Representation in Dismissing the Application for Review

8. Dickerson notes the general rule that the Bureau lacks the delegated authority to act on an application for review.[9] In this case, however, Dickerson had expressly agreed to withdraw its Application should it be provided the full measure of protection of the current mileage separations. Thus, the PRD Chief had the right to take Dickerson at its word and act on this representation without referring Dickerson's arguments to the full Commission for a decision on the merits. As the Dickerson appeal was dismissed as moot rather than on the merits, consideration by the full Commission was unnecessary. Moreover, Dickerson's appeal rights have been in no way affected by the action of the PRD Chief. Certainly no party may argue that court review following proper administrative appeals of the resolution of Dickerson's instant pleading would be improper. Thus, Dickerson's plaintive cries as to whether or not the proper authority decided this case amount to much ado about nothing.[10]

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[9]See Section 0.283(b)(3).

[10]Dickerson does have the temerity to surmise, without any factual basis, that the staff's motive in taking its action was to avoid or delay judicial review of its actions in this proceeding. Such groundless speculation has no place in a Commission proceeding but is, transparently, yet one more attempt by Dickerson to create additional "smoke" to try to cover the questions raised by its continued dogged pursuit of substantive "relief," which has now been granted for all

The Decisions of the PRD Chief and the ASD Assistant Chief were Correct

9. Dickerson next complains that the PRD Chief's decision was inconsistent with Commission precedent and standards with respect to channel allotment proceedings and that the Assistant Chief, Audio Services Division ("ASD") erred in granting Heart's upgrade application because Heart's agreement to protect Station WEAG in accordance with Section 73.215 fails to provide any protection to Station WEAG.

10. Dickerson primarily relies on Mount Pleasant, Iowa,[11] to support its claim that the new mileage separation rules are applicable to the Gator/Sarasota counterproposal. In that case, a petitioner proposed a co-channel upgrade while the old mileage separation rules were in effect. After the effective date of the new rules, another petitioner filed a counterproposal that failed to comply with the new rules. In those circumstances, the PRD Chief held that the counterproposal was required to comport with the new rules and accordingly rejected it. Mount Pleasant is clearly distinguishable from this case. Specifically, in the present case, although Dickerson conspicuously fails to mention it, the Gator/Sarasota counterproposal was originally filed as an independent Petition for Rule Making before Heart filed its rule making request and while the old rules were in effect. The original Gator/Sarasota Petition was still pending at the time the Gator/Sarasota counterproposal was filed and, in order to act on the Heart Petition, the pending Gator/Sarasota Petition would have had to be resolved. Gator and Sarasota filed their

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practical purposes through approval of Heart's application. Dickerson's energy would more usefully be spent dispelling the impression created by its petition that it is pursuing an agenda unrelated to its professed desire to provide 6 kilowatt service to Starke, Florida and surrounding areas.

[11] 10 FCC Rcd 12069 (Chief, PRD 1995).

counterproposal essentially to call the Commission's attention to the existence of this earlier-filed proposal, which was mutually exclusive to Heart's proposal, and to provide a proposal that allowed Gator, Sarasota and Heart to all achieve their objectives -- an upgrade of their facilities. Accordingly, as there was no prior pending petition involving the same channels and same cities at issue in connection with the counterproposal in the Mount Pleasant case, that case does not dictate the outcome of the current proceeding. Because the Gator/Sarasota Petition on which the Gator/Sarasota counterproposal is based was filed while the old mileage separation rules were in effect, the Bureau correctly applied the old mileage separation rules to that counterproposal.[12]

11. In addition, Dickerson points out that the Commission's rules prohibit the use of contour protection to comply with minimum distance separation requirements in channel allotment proceedings.[13] Contrary to Dickerson's assertion, however, the allotment of Channel 292C3 to Beverly Hills was not justified on the basis of Section 73.215 but rather was predicated on the grant of the Gator/Sarasota counterproposal, which was properly evaluated under the old spacing rules. Heart's upgrade application in which it relied on Section 73.215 was properly filed pursuant to the allotment of Channel 292C3, which had already been made.[14] The grant of

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[12]The fact that a different channel was allotted for use at Beverly Hills than that initially noticed does not in any way negate the effect of the Notice. The Commission has held that public notice of the potential use of a channel is sufficient to put all parties on notice that an alternate channel might ultimately be used in the same community. See Pinewood, South Carolina, 5 FCC Rcd 7609 (1990).

[13]See Amendment of the Commission's Rules to Permit FM Channel and Class Modifications by Application, 8 FCC Rcd 4735, 4736 & n.7 (1993).

[14]See Report and Order, 8 FCC Rcd 2197, 2199 (Chief, Allocations Branch 1993) (allotting Channel 292C3 to Beverly Hills, Florida).

the Heart application was merely an action subsequent to the rule making that had the effect of mooting the rule making objections of Dickerson -- as it allows Dickerson to do what it wants with respect to its Starke station, i.e., upgrade to six kilowatts. Accordingly, Dickerson's arguments that the justification of an allotment on the basis of contour protection violates the Commission's rules and that the PRD Chief may not waive the Commission's rules without direction or approbation from the full Commission are mere red herrings. No such violation or waiver has occurred.

12. Finally, Dickerson argues that the contour protection provided by Section 73.215 amounts to no protection at all because Heart's transmitter site will be located closer to Station WEAG than the current mileage separation rules allow. First, as the Mass Media Bureau found when granting the Gator/Sarasota counterproposal and allotting Channel 292C3 to Beverly Hills, Dickerson is only entitled to the protection provided by the old mileage separation rules. Nevertheless, given that Heart has promised to protect Station WEAG as a full 6 kilowatt station and, under Section 73.215, must protect Station WEAG to the same extent as would a fully-spaced station, Dickerson's argument amounts to no more than a dispute with the Commission regarding the efficacy of its contour protection rules, which Dickerson apparently believes fail to protect stations.[15] Such an argument, however, is misplaced, at best. If Dickerson thinks the

[15]It should be noted that Dickerson nowhere explicitly states in its petition that it rejects contour protection per se. Rather, it merely repeats over and over again the acknowledged fact that the Beverly Hills allotment is not fully spaced under the new spacing rules. But Dickerson's mantra cannot obscure the central fact that it is now free to provide 6 kilowatt service on Station WEAG, a fact that Dickerson does not deny. Therefore, even assuming arguendo that the Commission had committed a procedural mistake in this proceeding, it would be harmless error. That is, Dickerson has received the only substantive relief to which it could possibly be entitled in this matter -- the only substantive relief it professed, until recently, to want.

contour protection rules should be modified or abolished, it should initiate a rule making proceeding requesting such action.[16] Given that the rule currently exists, the PRD Chief may assume that the rule does what it purports to do -- provide adequate protection to short-spaced stations. Moreover, Dickerson's arguments are especially surprising given that Dickerson itself initially proposed protection of Station WEAG as a full 6 kilowatt station as a way of resolving its objections in this proceeding in its Petition for Reconsideration, and Heart first agreed to provide such protection in its supplement to the opposition to Dickerson's Application for Review.[17] Heart's supplement was served on all parties to this proceeding, including Dickerson. Nevertheless, Dickerson did not claim at that time that Heart's proposal failed to protect Station WEAG. In fact, Dickerson did not respond to this supplement at all.[18]

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[16]See 47 C.F.R. § 1.401(a).

[17]See Dickerson Petition for Reconsideration at 8; Heart Supplement to Opposition to Application for Review (March 13, 1996).

[18]Dickerson also claims that this proceeding may be pointless because Heart's upgrade is contingent on the abandonment of Channel 292C3 by Station WDFL(FM), Cross City, Florida, and the likelihood of such abandonment is remote because Station WDFL(FM) has been denied local approval of the site specified in its construction permit to change channels. Dickerson nowhere discloses that it took the lead role in drumming up opposition at the Gilchrist County zoning hearing, a curious fact that intensifies the questions about Dickerson's ultimate agenda here. See note 10 supra; Exhibit A, Letter from Benjamin F. Dickerson to Citizens of Gilchrist County, Brad Keoun, Gilchrist Will Vote on Whether to Allow Radio Tower, Gainesville Sun, March 30, 1996, at 5B. In any event, despite Dickerson's conviction that Station WDFL(FM) will never change channels, this outcome is far from guaranteed as Dickerson has provided evidence of an initial rejection of zoning at a single location, and it has not demonstrated that WDFL(FM) is without other options that would accommodate this proceeding. Thus, the Bureau should not take any action based on Dickerson's unsupported assumption.

Conclusion

13. Dickerson likens the Bureau's actions to M.C. Escher's drawing titled "Drawing Hands." This fanciful comparison cannot obscure the one fact that Dickerson cannot avoid -- with respect to Beverly Hills, Dickerson can now increase the operating power of Station WEAG to six kilowatts. Therefore, Dickerson has achieved the goal it claims to have sought. The PRD Chief's decision simply recognized that truth and found that Dickerson's alleged basis for objection had been satisfied.

14. Furthermore, contrary to Dickerson's assertion, the Bureau emphatically did not use its grant of the Heart application to justify its channel allotment decision. The decision to grant the Gator/Sarasota counterproposal to allot Channel 292C3 to Beverly Hills was premised on the old mileage separation requirements, which were correctly applied to the counterproposal.

WHEREFORE, for the foregoing reasons, Gator Broadcasting Corporation, Heart of Citrus, Inc., Times Publishing Company and New Wave Communications, L.P. hereby request that the Commission deny Dickerson Broadcasting, Inc.'s Petition for Reconsideration.

Respectfully Submitted,

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June 3, 1996

EXHIBIT A

WEAG FM 106.3
Dickerson Broadcasting, Inc.
1421 South Water Street
Starke, Florida 32091
Telephone (904) 964-5001

Re: Proposed construction of a 600-foot radio tower to be created in southeastern Gilchrist County

Dear Citizens of Gilchrist County:

My name is Ben Dickerson and I own a country music radio station located in Starke, Florida, WEAG-FM (106.3). On March 4th, 1996, the Gilchrist County Commission met to hear public comments regarding proposed construction of a 600-foot tower to be created by a radio station from Cross City, Florida, WDFL-FM. The proposed tower site is in the vicinity of the Waccassassa Flats area, approximately 1.9 miles south of SR 26 on S.E. 25th Avenue, then approximately 4/10 mile east of the intersection of S.E. 25th Avenue and S.E. 100th Street. Should construction of this tower be approved by the Gilchrist County Commission, WDFL-FM will increase its power to 100,000 watts, the most powerful broadcast signal currently being licensed anywhere in the nation.

I oppose construction of this tower for several reasons. Mainly, I am concerned that this 100,000 watts station shall wipe out a large portion of my 1,350 watt signal from reaching many of my listeners. We have our attorneys challenging the licensing of this station before the Federal Communications Commission (FCC), in Washington, D.C. While this fact may not be of much concern to you, the information I am providing should.

First, the proposed site for this radio tower is in the vicinity of the environmentally sensitive Waccassassa Flats area. WDFL-FM denies this fact, but our own environmental experts have exposed this to be untruthful. At the last County Commission hearing, WDFL-FM admitted that they have never even undertaken a comprehensive environmental assessment.

Next, the proposed 689-foot radio tower, if constructed, shall broadcast 100,000 effective radiated watts. According to the FCC, a tower of this size and power shall also create an undesirable phenomenon known as "FM Blanketing Interference." Even though the South Florida owners of this station failed to inform your county commissioners about this undesirable byproduct, in their application for FCC licensing, WDFL-FM's owners advised that according to their own calculations they anticipate this "FM Blanketing Interference" shall extend outward up to a 2.44 mile radius from their tower. At the last county commission hearing, an expert broadcast engineer discussed the sort of interference problems he experienced when his station built a radio tower of equivalent size and power. This expert further stated that the actual distance from which interference complaints would likely be received extends out as much as 6 miles from the tower site.

It appears to be quite unfortunate for the residents of Levy County that although this tower shall be situated only one mile from the Levy County line, the anticipated interference problems will likely spill over a great distance into their county. Nonetheless, they shall have no say in this matter, because the proposed tower site is located in Gilchrist County.

While you may initially feel that a big radio station coming to your county represents growth, please do not be misled. Radio stations often locate their actual radio station and offices in large cities, several miles away from their rural tower site. The tower is simply controlled by remote. More plainly stated, in all likelihood, all that the citizens of Gilchrist County shall get is a giant, 689-foot tower and all the interference problems associated therewith.

What are the effects of "FM Blanketing Interference?" Well, the most easily perceived problem is a snowy, wavy, hard to see television picture. Other electronic equipment which could be affected include stereo hi-fi equipment, cordless telephones, satellite dish receivers, regular TV antennas, public address systems, emergency mobile radios, and telephone answering machines, etc., etc., the list goes on.

Did you know that the FCC only requires the radio station to solve any interference complaints for a limited period of one (1) year from the time the station first goes on the air. And, this FCC rule specifically does not include interference from malfunctioning or mistuned receivers, improperly installed antenna systems, or the use of high gain antennas or TV booster amplifiers. Also, during this one (1) year period, the radio station is only required to solve the problems of those individuals who have properly filed their complaint with the FCC, in Washington, D.C. Do not be fooled into believing that problems will be few and isolated. The FCC reports that in Poplar Bluff, Missouri, a radio tower of similar size and power had generated over 1,000 complaints of interference, and seven years later, they are still on the air!!!

Suppose WDFL-FM claims that your interference problem is caused by your own faulty equipment. How would you go about challenging this? Would you hire an engineer? Will you have to hire a lawyer? Would you seek assistance from the bureaucrats in Washington, D.C.? And what happens if WDFL-FM sells this radio station to someone else? What will WDFL-FM's promises and assurances be worth then?

Citizens of Gilchrist County, if any of this concerns you, then please come and attend the Gilchrist County Commission meeting to be held on Monday, April 1, 1996, at 4:00 p.m. If you have any questions or comments, call your county commissioner. They represent you, and they want to know your opinion? Should you still have questions, you may call us here at WEAG-FM, we shall be happy to assist. You may reach us at (904) 964-5001.

We thank you for your attention in this matter.

Sincerely,

Benjamin F. Dickerson
Owner, WEAG-FM

BUSINESS

Gilchrist will vote whether to allow radio tower

By [redacted]
Special to The Sun

TRENTON — The Gilchrist County Commission will decide here Monday whether a Dixie County radio station can build a 689-foot radio tower near Trenton.

To tap into potentially lucrative markets, including Gainesville, a Cross City country music station, WDFL-FM (106.3), wants to build a 100,000-watt radio tower near the Gilchrist County seat.

But commissioners are undecided — and residents are divided — on whether the proposed tower would hurt or help the county.

On one hand, residents are concerned about a phenomenon known as "FM blanketing interference," which sometimes causes distortion on televisions near high-power radio towers.

Gilchrist resident Laura Fullen says she doesn't want the county to approve the radio tower until she is sure it won't affect her TV reception.

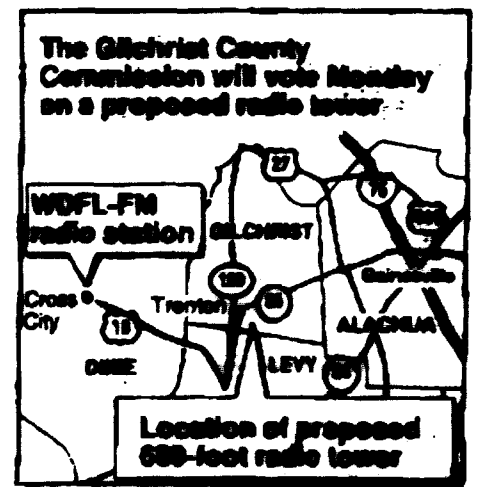
"If we move too quickly, we may make a mistake and do something we have to live with," said Fullen, who lives in Shady Grove, the rural neighborhood where the tower would be erected.

On the other hand, some officials believe the county could benefit from taxes on the tower, which could amount to more than $1,500 a year, according to estimates by Gilchrist County Property Appraiser Ray Harrison.

What's more, WDFL has offered to let the sheriff's office use the proposed tower to broadcast its two-way radio signals, which currently don't reach the entire county.

Meanwhile, some residents think this controversy may be nothing more than a turf war over North Central Florida's airwaves.

At a March 4 county commission meeting, WDFL co-owner Jim Johnson got into what one attendee called a "cat fight" with Ben Dickerson, owner of a Starke radio station that also broadcasts on 106.3.



JONI SCHMIDT/The Gainesville Sun

Johnson, who would change his radio broadcast frequency to 106.9, says that interference problems only occur for certain types of TV equipment and that he would replace any equipment that causes problems.

Dickerson, who doesn't want WDFL's signal to interfere with his own, says that serious blanketing problems have occurred as far out as six miles. Furthermore, he says, WDFL is only required to fix interference problems during the first year of the tower's operation.

Gilchrist County Commissioner Sue Beach-Suggs says she won't decide on the issue until she has all the information at Monday's 4 p.m. meeting.

"We have a tremendous amount of residents who are very concerned," she says. "My guess is that it's going to be a pretty heated debate."

CERTIFICATE OF SERVICE

I, Devora Willis, hereby certify that I have on this 3rd day of June 1996 caused a copy of the foregoing "Opposition to Petition for Reconsideration" to be served by first class U.S. mail, postage prepaid, upon the following:

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